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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 17

JULIUS A. WOLF, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO.

No. 18

JULIUS A. WOLF, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF COLORADO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION AS *AMICUS CURIAE*

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of Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it Please the Court:

1. The undersigned, as counsel for the New York County Criminal Courts Bar Association, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiae*.

2. The consent of the attorneys for petitioner and for respondent to the filing of this brief has been requested. Consent was given by petitioner. Respondent replied:

> "Mr. Hornbein states that his firm as counsel for the petitioner will execute the stipulation, but it is the desire of this office to examine the proposed brief before joining in same."

In view of the fact that the appeals herein were argued before this Court on October 19, 1948, application for leave

to file this brief as *amicus curiae* is being made to this Court instead of awaiting respondent's consent.

3. The New York County Criminal Courts Bar Association is one of the important bar associations of the nation, concerning itself—as a matter of the professional obligation of its members to the community—with the administration of the criminal law.

4. Petitioner was convicted, in each case, of a conspiracy to perform an abortion. The undersigned believes that such conviction was brought about by the admission in the trial court of evidence obtained as a result of unreasonable search and seizure, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. Petitioner filed before this Court his petition for a writ of certiorari, which petition was granted, and the two appeals herein were argued before this Court on October 19, 1948.

6. The New York County Criminal Courts Bar Association submits that the requirement of due process contained in the Fourteenth Amendment was violated by the admission in the trial court of the evidence in question.

7. The New York County Criminal Courts Bar Association, in accordance with what it deems to be the professional obligation of its members, desires to file a brief as *amicus curiae* in support of petitioner's writ of certiorari to the Supreme Court of the State of Colorado.

Wherefore it is respectfully requested that leave be granted to the New York County Criminal Courts Bar Association to file the accompanying brief in these cases as *amicus curiae*.

March 28, 1949.

Respectfully submitted,

EUGENE L. GAREY,
Counsel for New York County Criminal Courts Bar Association.

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BRIEF OF NEW YORK COUNTY CRIMINAL COURTS BAR ASSOCIATION AS *AMICUS CURIAE*

Preliminary Statement

The undersigned adopts, as part of this brief, all statements contained at pages 1 to 7 of petitioner's brief under the captions "Opinions Below," "Jurisdiction," "Dates of Judgments," "Constitutional Question Involved," "Specification of Errors to be Relied on," and "Statement of the Case."

It is not the purpose of this brief to repeat any portion of the argument contained in petitioner's brief. This brief is intended only to supplement the argument therein.

POINT I

The due process requirement of the Fourteenth Amendment embraces a prohibition against unreasonable searches or seizures by State officers.

The undersigned find little to add to the argument contained in petitioner's brief on this point.

Only one additional argument might appropriately be made, stemming from the dissenting opinion of Roberts, *J.*, concurred in by Brandeis, Sutherland and Butler, *JJ.*, in *Snyder* v. *Massachusetts*, 291 U. S. 97, 78 L. ed. 674 (1934); the point discussed in this dissenting opinion was one on which the majority did not disagree with the dissenting Justices (see pp. 105-106).

Mr. Justice Roberts there stated (at pp. 129-131):

> "To allay the apprehensions of the people lest the federal government invade their liberties, the first ten amendments to the Constitution were adopted. The Sixth assures one accused of crime that if prosecuted under federal law he shall have a public trial, be informed of the nature and cause of the accusation, be confronted with the witnesses against him, and have the assistance of counsel for his defense.
>
> "But the purpose that all trials, in state as well as national tribunals, should not lack the same quality of fairness, is evidenced by the embodiment of a guarantee of similar import in the constitution of every state in the Union. [Footnote: In two States (California and Nevada) the constitutions omit reference to the right of the accused to confront the witnesses against him; but the omission is supplied by statute.]
>
> * * *
>
> "In the light of the universal acceptance of this fundamental rule of fairness that the prisoner may be present throughout his trial, it is not a matter of assumption but a certainty that the Fourteenth Amendment guarantees the observance of the rule."

From the foregoing quotation it will be noted that the four dissenting Justices (with whom the majority Justices did not disagree on this point; see pp. 105-106) were of opinion that where forty-six States had adopted constitutions similar in this respect to the constitutional mandate binding upon the Federal courts, the requirement there in question was to be deemed a fundamental rule of fairness, the observance of which was guaranteed by the Fourteenth Amendment.

A fortiori must that be deemed true with respect to the search and seizure requirement here at issue, in view of the fact that the constitution of each and every one of the forty-eight States prohibits unreasonable search and seizure.

See Constitutions of: Alabama: *I, 9(1819)*, I, 5(1901); Arizona: II, 8(1911); Arkansas: *II, 9(1836)*, II, 15(1874); California: *I, 19(1849)*, I, 19(1879); Colorado: II, 7(1876); Connecticut: I, 8(1818); Delaware: *I, 6(1792)*, I, 6(1897); Florida: *I, 7(1838)*, Decl. of Rights, 22(1885); Georgia: *I, 18(1865)*, I, I, XVI (1877); Idaho: I, 17 (1889); Illinois: *VIII, 7(1818)*, II, 6(1870); Indiana: *I, 8(1816)*, I, 11(1851); Iowa: *I, 8(1846)*, I, 8(1857); Kansas: *I, 14(1855)*, Bill of Rights, 15(1859); Kentucky: *XII, 9(1792)*, Bill of Rights, 10(1891); Louisiana: *VII, Art 108 (1864)*, I, 7(1921); Maine: I, 5(1819); Maryland: *Decl. of Rights, XXIII (1776)*, Decl. of Rights, 26 (1867); Massachusetts: I, Art. XIV (1780); Michigan: *I, 8(1835)*, II, 10(1908); Minnesota: I, 10(1857); Mississippi: *I, 9(1817)*, III, 23(1890); Missouri: *XIII, 13(1820)*, II, 11(1875); Montana: III, 7(1889); Nebraska: *I, 11(1866-1867)*, I, 7(1875); Nevada: I, 18(1864); New Hampshire: *I, XIX (1784)*, Bill of Rights, 19(1942); New Jersey: *I, 6(1844)*, I, 7(1947); New Mexico: II, 10(1911); New York: I, 12(1938); North Carolina: *Decl. of Rights, XI (1776)*, I, 15(1868); North Dakota: I, 18(1889); Ohio: *VIII, 5(1802)*, I, 14(1851); Oklahoma: II, 30(1907); Oregon: I, 9(1857); Pennsylvania: *Decl. of Rights, X (1776)*,

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POINT II

This Court's power to require observance of the due process clause of the Fourteenth Amendment to the Constitution of the United States by the Courts of a State is not circumscribed by the consideration that this Court may, in so doing, override what the State Courts declare to be a rule of evidence.

It appears to be respondent's position that even though this Court may conclude that the Fourteenth Amendment to the Constitution of the United States bars unreasonable search and seizure by State officers, nevertheless this Court may not require that the use of evidence obtained as a result of such search and seizure shall be barred in a State court, since that would be to interfere with the application in a State court of a mere rule of evidence.

It has frequently been held by this Court that the declaration of a State Supreme Court that a statute lays down a mere rule of evidence does not bind this Court in its inquiry as to whether a petitioner's constitutional rights under the Fourteenth Amendment have been invaded. —

Truax v. *Corrigan*, 257 U. S. 312, 324, 66 L. ed. 254, 259 (1921);

Pollock v. *Williams*, 322 U. S. 4, 13, 88 L. ed. 1095, 1101 (1944);

Bailey v. *Alabama*, 219 U. S. 219, 55 L. ed. 191 (1914).

The principle that this Court may inquire into the correctness of a description of a rule of law—whether laid down by a State legislature or by a State Supreme Court, and whether laid down in a statute or as a matter of common law—as constituting merely a rule of evidence and not a rule of substantive law, has been applied by this Court in numerous instances.

Among the many types of cases in which this principle has been applied have been the cases of coerced confessions. See, for example:

Lisenba v. *California*, 314 U. S. 219, 86 L. ed. 166 (1941);

Ashcraft v. *Tennessee*, 322 U. S. 143, 88 L. ed. 1192 (1944);

Vernon v. *Alabama*, 313 U. S. 547, 85 L. ed. 1513 (1941);

Lomax v. *Texas*, 313 U. S. 544, 85 L. ed. 1511 (1941);

White v. *Texas*, 310 U. S. 530, 84 L. ed. 1342 (1940);

Canty v. *Alabama*, 309 U. S. 629, 84 L. ed. 988 (1940);

Chambers v. *Florida*, 309 U. S. 227, 84 L. ed. 716 (1940).

In the *Lisenba* case, *supra*, this Court, in an opinion by Roberts, J., declared (at pp. 236-237):

> "The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such

rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession. * * *

"The concept of due process would void a trial in which by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence."

The close analogy between the issue in the *Lisenba* case and the issue here at bar is self-evident. "*The aim of the requirement of due process is* not to exclude presumptively false evidence, but *to prevent fundamental unfairness in the use of evidence, whether true or false*,"—and equally whether the evidence consists of a coerced confession or whether it consists of a document obtained as a result of unreasonable search or seizure.

The opinion of this Court by Roberts, *J.*, from which the foregoing has been quoted, was concurred in by all of the members of this Court except Black and Douglas, *JJ.*, who did not disagree with the enunciation of the foregoing principle, but who voted to reverse the conviction, presumably accepting as correct the statement in this Court's opinion, but disagreeing as to its application.

POINT III

If the Fourteenth Amendment be construed as prohibiting unreasonable searches and seizures by State officers, the use of evidence thus obtained should be barred because that is the only effective method of enforcing such prohibition. To point to the other theoretically available methods of enforcing such prohibition is to pay merely lip service to the constitutional requirement while actually vitiating it.

If it were the fact that the prohibition of unreasonable searches and seizures could be effectively enforced by any means other than the barring from use or admission into evidence of documents unreasonably searched for or seized, then there might be merit to respondent's contention that this Court should not interfere with the application in a State court of a rule of evidence.

Unfortunately, however, the actual situation here is that what is described by respondent as a mere rule of evidence is actually the sole effective means of enforcing the substantive rule of law.

Other theoretical remedies for violation of the prohibition of unreasonable searches and seizures are pointed to. Experience has adequately demonstrated, however, that such remedies are remedies in name only. In reality, no remedy for the enforcement of the constitutional requirement is available except the exclusion of the evidence unreasonably searched for or seized.

A painstaking study and analysis of this question was made in an article entitled "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," written by Thomas E. Atkinson, and appearing in 25 Col. L. Rev. 11 (1925).

The undersigned feel that nothing which they could say on this point would be as helpful to this Court as a reproduction of some pages of that article, and in lieu of further

gument on this point by the undersigned, pages 21-24 that article are here reproduced:

"'The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures *shall not be violated*.' This mandatory language refers principally to executive and judicial violations. To be at all sensible, a construction must be given which will effectively curtail such acts.

"Means of curtailment may be direct or indirect—or more properly speaking—more or less direct. Thus it might be imagined that an armed guard could be placed in front of every dwelling to see that no officer should make an unreasonable search. This means of enforcing the Fourth Amendment, if practical, would be quite direct.

"Another means of enforcement is self-help, *viz.*, resistance to the attempt to make the unreasonable search. In many, if not in most cases, this remedy fails because the search is conducted in the person's absence. But if the person be present, he may no doubt use sufficient force to prevent the unreasonable search and, possibly, may kill the officer if necessary.

"This method of insisting upon one's rights is barbaric; it is attended with turmoil and perhaps more serious consequences; it is thoroughly inadequate, for the person is required to decide instantly and unaided the difficult question of whether the search is reasonable. If he erroneously decides that the search is unreasonable, he lays himself open to serious consequences in resisting.

"There are two additional means of enforcing the Fourth Amendment which are fairly direct, *viz.*, by civil suit against the offending officer and by criminal action against him. However it may have been formerly, it is every day observation that neither is adequate at present.

"Generally an innocent person whose rights have been invaded will not seek civil relief unless there is substantial physical or property injury. Courts and juries are not in the habit of giving substantial damages where there has been a mere violation of privacy without visible loss. Few innocent persons will lay out time and money in order to recover nominal damages for

the violation of a right, no matter how fundamental and precious that right may be. Yet the soul will be rankled and the people dissatisfied.

"A guilty person is in even a worse position. He could not even *hope* to recover more than nominal damages unless the search was attended by serious personal injury or destruction of lawful property. Of course he could not recover the amount of the fine or the value of his time during imprisonment.

"The other alternative, a criminal action against the offending officer, seems inadequate. If mere technical violations of the Fourth Amendment are punished criminally, this would discourage an officer from doing his duty whenever there could be any doubt as to the legality of the search. On the other hand, if punishment be confined to malicious violations of the Fourth Amendment or cases in which substantial physical damages were done, the result would be that the force of the Fourth Amendment would be gradually whittled away.

"In addition, prosecutors are naturally loathe to proceed against the officers who have furnished them the convicting evidence. An example of this is shown by recent experience. An amendment to the National Prohibition Law provides for criminal punishment of officers who make illegal searches. About three years have elapsed and there is no reported case in which an officer has been punished under its provisions. Cases are numerous in which unreasonable searches were made. The absence of cases punishing officers criminally or giving compensation to persons whose rights are violated shows that these means are not adequate to preserve the Fourth Amendment as part of our living law.

"If it be said that this is a confession of weakness in our law and legal system, it cannot be helped. There is a natural limitation on all law; that it should fairly comply with the ideas of the people as a whole. No rule or system can change conditions which are deeply imbedded in the hearts of men.

"What law can compel or induce innocent persons to sue offending officers? What prosecutor will go out of his way to find grounds for a criminal charge against the officers, whose delictual diligence has raised the prosecutor's batting average? And, as has been

humorously remarked, what United States marshal is going to be confined on prison fare?

"The exclusion of evidence procured by violating the Fourth Amendment is possibly still less direct than any of the methods suggested above. Though indirect, it is none the less real enforcement. Something is necessary to curtail violations which interfere only with the convenience and feelings of the people. The more violent and obvious infringements may be curtailed through civil or criminal actions against the guilty officers.

"If the officers know that the evidence which they obtain through violations of the Amendment cannot be used, they will have no incentive to indulge in even merely technical violations. With nothing to gain by the unreasonable search, and with the possibility of a civil suit or criminal charge, the tendency of the officers will be to refrain from violations of the provisions of the Constitution. Analogous situations, in which the law resorts to similar indirect means of enforcing a rule, can easily be found."

The documentation of the foregoing article in footnotes is not here reproduced. It contains much instructive material and justification for the learned author's conclusion, from his study, that the only genuine means of enforcement of the prohibition of unreasonable searches and seizures is the barring from evidence of material thus obtained, and that the other so-called remedies are such only in name.

In its opinion in one of the very cases at bar, the Supreme Court of the State of Colorado has revealed its own realization that the unreasonable search and seizure prohibition cannot be effectively enforced except by barring the evidence unreasonably searched for or seized.

In Case No. 17, the Supreme Court of Colorado, in its opinion reported at 117 Colo. 279, 283, 187 P. 2d 926, 928 (1947), states:

"If a case ever comes before us which demonstrates that the rule in the Massantonio case [admitting evidence unreasonably searched for and seized] has

> worked injustice, or prevented justice, it will be time enough to consider alteration or modification of that rule."

In other words, if a case subsequently arises in which the Supreme Court of the State of Colorado thinks that an innocent man has been convicted as a result of admission of evidence unreasonably searched for or seized, then it may hold that such evidence should have been barred; but where it thinks that the convicted man was guilty, it will continue to hold such evidence admissible.

This is not enforcement of the constitutional search and seizure requirement. It discriminates between the innocent and the guilty: if a man is innocent, then his home may not be searched without a warrant; if he is guilty, then it may be.

The most disturbing feature of this pronouncement by the Supreme Court of the State of Colorado is that its contemplated enforcement of the search and seizure requirement by the barring of evidence will be only in those cases where enforcement by that method is least needed.

An innocent man, whose unjustified conviction has been reversed by the State Supreme Court, would doubtless stand a much better chance of profiting by the other theoretical remedies than would a guilty man whose conviction has been sustained by the State Supreme Court. Thus, the innocent man might far more reasonably hope to secure civil damages in a suit against the State officers who had conducted the illegal search and seizure than would a convict issuing his civil process from his cell in state's prison.

And yet, it is only to the citizen who might conceivably have other remedies available to him that the State Supreme Court is contemplating the possible extension in the future of the further remedy of barring admission into evidence against him of material illegally searched for or seized. To the person who patently has no other remedy

than the barring of such evidence, the State Supreme Court is determined not to extend the remedy of barring the evidence.

This is not merely discriminatory enforcement of the constitutional requirement. It is unsound discriminatory enforcement of such requirement.

CONCLUSION

The judgments of the Supreme Court of the State of Colorado in the cases at bar should be reversed.

Respectfully submitted,

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